Supreme Court, U.S.
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No. 98-819

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RICHARD P. KRELL, *et al.*,

Petitioners,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

-and-

CAROL NICHOLSON, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CAROL NICHOLSON, *et al.*

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QUESTION PRESENTED

In a unanimous opinion, the United States Court of Appeals for the Third Circuit (Scirica, J.) affirmed the opinion of the District Court (Wolin, J.), certifying a settlement class. The Petition for Certiorari challenges those rulings, and the courts' jurisdiction to make them, premised upon nothing more than previously rejected factual arguments concerning the nature of the Class Representatives' claims. The Petition also mischaracterizes the opinions below, identifies no Circuit Court conflicts, and raises no substantial legal issues. Granting certiorari would require this Court to revisit numerous findings of fact and to re-decide many of them. Accordingly, should this Court deny certiorari?

PARTIES TO THE PROCEEDING

The respondent identified in the caption to the Petition is The Prudential Insurance Company of America ("Prudential"). The respondents should also include the named class representatives, Carol Nicholson, Martin Dorfner, Vincent Kuchas, Elizabeth Kuchas, and Norman Gassman. The petitioners are objectors represented by a single law firm; their names are Richard P. Krell, Elizabeth Bajek, Amanda Bajek, Helen Bartsch, Mark Ciconte, Raymond Dolce, Margaret Dolice, Louise Duggan, Peter Duggan, Charles Duncan, Mary Howe, Mary Krell, William Morris, Diana Racer, Thomas Racer, Gweneth Reidel, The Estate of Carl J. Scalzo, Marie Scalzo, Terry Sligar, Alice Smith, Jerry Smith, and William Walton.

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (Wolin, J.) is reported at 962 F. Supp. 450. The unanimous opinion of the United States Court of Appeals for the Third Circuit (Scirica, J.) is reported at 148 F.3d 283.

STATEMENT OF JURISDICTION

Jurisdiction is alleged to exist in this Court pursuant to 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

During early 1995, aggrieved policyholders throughout the country brought both individual and class actions against Prudential. From their inception, the class actions challenged the methods Prudential used to market, sell, and administer permanent life insurance policies sold during the class period. Plaintiffs alleged that Prudential management developed and implemented a fraudulent scheme to sell life insurance policies through a broad array of deceptive sales practices, which included *but were not limited to* Prudential's "vanishing premium," "churning," and "investment plan" sales tactics.

Contrary to the assertions made in the Petition for Certiorari, each of which were rejected by the District Court and by the Third Circuit, plaintiffs' allegations, and the named representatives' claims, were not limited to "vanishing premium," "churning," and "investment plan" issues. As both the District Court and the Third Circuit correctly found, Plaintiffs also sought redress for Prudential's dividend practices, which affected *all* Class Members, and for Prudential's deceptive administration of Class Members' policies to conceal

fraudulent sales and effectuate the scheme, including Prudential's use of unauthorized policy loans and similar contrivances to deplete policyholders' cash values. Plaintiffs alleged that Prudential's deceit infected the design and promotion of its insurance products, the training and supervision of its agents, the process Prudential used to declare policy dividends, Prudential's investment practices, and even the manner in which policies were serviced and administered. *See* App. 103-06 (Third Circuit finds that, in addition to vanishing premium, churning, and investment plan allegations, "other allegations address conduct which supports the common scheme theory and which does not fall neatly within the three enumerated categories"); App. 422-24 (District Court finds that "[t]he Complaint involves allegations relating to all wrongful conduct in the sale and treatment of life insurance policies"). *See also* Transcript, April 16, 1996, at 72-73 (early litigation phase hearing at which Judge Wolin characterized Complaint as including allegation that "Prudential manipulated the surplus so that . . . all 10 million policyholders did not receive a fair distribution of the surplus"); App. 194 ("Prudential engaged in a systemic fraudulent marketing scheme"); App. 314-15 ("Krell *wrongfully* alleges that the class fails for lack of typicality because no class representative claims to have been injured by 'other improper sales practices.'") (emphasis added); App. 181-90 (District Court discussion of each Class Representative's allegations).

After two years of hotly contested litigation, the parties to the class action started discussions that ultimately resulted in the class settlement. The settlement makes available to all class members economic benefits that are uncapped and undiminished by any allocation among them. The settlement includes a Basic Claim Relief ("BCR") package that permits the election of automatically-available benefits to alleviate the harms resulting from Prudential's wrongful conduct, without

any need to file a Claim Form, and an Alternative Dispute Resolution ("ADR") process that provides more tailored remedies based upon the responses to a relatively simple Claim Form crafted by plain-language experts. The ADR process permits claimants to receive full compensatory or rescissionary relief plus extra-compensatory relief similar to punitive damages.

The settlement was endorsed by the Departments of Insurance of all 50 States and the District of Columbia, many of which wrote letters to the District Court urging approval of the settlement, and all of which adopted the settlement through individual Consent Decrees.

Based on a comprehensive evidentiary record — including numerous expert affidavits and detailed documentary evidence, affidavits, and deposition testimony — the District Court (Wolin, J.), in exhaustive findings of fact and conclusions of law, certified a settlement class that is co-extensive with plaintiffs' factual and legal claims, and with the proposed settlement. Moreover, in approving the settlement, the District Court complied in full with the extremely demanding legal test set forth in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997). Before *Georgine* was affirmed by this Court, the Third Circuit required settlement classes before District Courts in that Circuit to comply with all aspects of Rule 23, including manageability at trial.

Subsequent to the District Court approval, this Court affirmed the Third Circuit's *Georgine* opinion and ruled that, if anything, the Third Circuit's approach was too restrictive, to the extent it required settlement classes to demonstrate manageability. *See Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

Armed with the benefit of this Court's *Amchem* opinion, the Third Circuit (Scirica, J.) unanimously affirmed the District Court.

Both the District Court and the Third Circuit exhaustively addressed all of the issues raised by the Petition for Certiorari, and rejected them not only on the law, but also as wrong in their factual premises. For example, the courts below rejected the false factual allegations, which are repeated again in the Petition, that the so-called "other claims" were neither pled nor prosecuted, that the Class Representatives did not assert these claims, and that the settlement expanded the class to include these previously unpled claims and claimants. *See* App. 103-06; 314-15; 194; 422-24; 181-90.

Similarly, the courts below rejected Petitioners' contention that the federal and state law fraud claims lacked a "common nucleus of operative fact." Contrary to Petitioners' argument that the facts were ignored, the courts below explicitly found that the federal and state law claims were "inextricably factually intertwined." *See* App. 267-72 (District Court finds that "the state law claims are part of the same case or controversy as the federal claims because the claims are inextricably factually intertwined"); App. 36-43 (Third Circuit finds that plaintiffs alleged a "widespread scheme," that plaintiffs alleged the scheme constituted common law fraud and violations of §§ 10(b) and 20(a) of the Securities Exchange Act, and that the claims were "inextricably intertwined").

REASONS FOR DENYING THE WRIT

The Petition merely invites this Court to act as a court of error. The Petition seeks the re-visiting of the extensive factual findings made by the District Court and affirmed by the Third Circuit, and then asks this Court to re-apply relatively settled

law to new factual findings. The Petition does not identify a single question of federal law on which there is a division among the Courts of Appeal, and raises no substantial legal issues worthy of this Court's attention. *See* Supreme Court Rule 10 (listing considerations that favor certiorari and concluding that, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

As detailed below, Petitioners' legal arguments are entirely dependent upon factual premises concerning the nature of the Class Representatives' claims that were rejected both by the District Court and by the Third Circuit. The Petition also mischaracterizes the opinions of those courts. Petitioners' legal arguments — which for the most part are undisputed — become irrelevant if the District Court's factual findings (and the Third Circuit's affirmance of those findings) concerning the nature and breadth of the Class Representatives' claims are left undisturbed.

For example, Petitioners challenge both federal jurisdiction and standing because, they argue, "[t]he Settlement Agreement expanded the Class to include millions of policyholders who had no pled claims." Petition at 5. Yet, from the very beginning of the litigation, the District Court recognized that plaintiffs' complaint alleges that "Prudential manipulated the surplus [during the class period] so that . . . all 10 million policyholders did not receive a fair distribution of the surplus." Transcript, April 16, 1996, at 72-73. (873-74 of Third Circuit Appendix). *See also* App. 103-06; 314-15; 194; 422-24; 181-90. Similarly, arguing that the federal and state law claims lack what the Petition calls "factual interdependence," the Petition completely ignores the factual findings below that the federal and state law claims were "inextricably factually intertwined." App. 267-72; App. 36-43.

Thus, the Petition presents no issues worthy of certiorari review.

I.

THE COURTS BELOW PROPERLY MADE FACTUAL FINDINGS THAT THE FEDERAL AND STATE LAW FRAUD CLAIMS AROSE FROM A "COMMON NUCLEUS OF OPERATIVE FACT" AND WERE "INEXTRICABLY FACTUALLY INTERTWINED"

Ignoring the factual findings below, the Petition challenges federal subject matter jurisdiction. But it is undisputed that plaintiff Dorfner properly asserted federal subject matter jurisdiction: his Prudential VAL policy was a registered security sold pursuant to a prospectus, and Dorfner asserted that the sale constituted fraud under the federal securities laws.

With federal question jurisdiction established, the District Court reviewed the factual relationship between the federal and state law claims, and then properly exercised supplemental jurisdiction under 28 U.S.C. § 1367 over the remaining state law claims and claimants. 28 U.S.C. § 1367 confers jurisdiction over the entire "case or controversy," and directs that federal courts "shall" hear all claims that are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy," unless one of the express exceptions set forth in § 1367(c) — none of which were urged below or are urged in the Petition — applies. Claims are part of the same case or controversy if they derive from a "common nucleus of operative fact" and "are such that [the plaintiff] would ordinarily be expected to try them all in one judicial proceeding." *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966).[1] The

1. *See also MCI Telecomm. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1102 (3d Cir. 1995), *cert. denied*, 117 S. Ct. 64 (1996) (citations omitted); *Lyon v. Whisman*, 45 F.3d 758, 760-61 (3d Cir. 1995); *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir. 1991); 13B Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* § 3567.1 at 32 n.9 (Supp. 1998) (citing cases).

policy reasons supporting this doctrine — judicial economy, convenience, and fairness to the parties — are particularly significant to this case: because, as Petitioner concedes, approximately 30% of the class's insurance policies were registered securities, a substantial number of legally and factually similar federal and state-law claims were resolved through a single litigation.

As discussed above, the courts below found that plaintiffs alleged that Prudential management developed and implemented a fraudulent scheme on a companywide and nationwide basis through the use of uniformly deceptive techniques. Dorfner was one of the victims. His federal claims are based on the same conduct as his, as well as all class members', state law claims. For example, the courts below found that Dorfner was churned into a vanishing premium policy, victimized by unauthorized policy loans, sold a policy that was far more interest-sensitive than disclosed, and misled by subsequent efforts to conceal the misconduct. App. 184-87. Because the same facts were found to support both the federal and state claims, supplemental jurisdiction over the state law claims was proper. App. 36-43; App. 267-72.

In the Petition for Certiorari, Petitioners improperly raise for the *first* time an argument they never made below: all but conceding that the *Gibbs* test is satisfied, Petitioners seem now to be arguing that *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994) and *Peacock v. Thomas*, 516 U.S. 349 (1996) create a "factual interdependence" test for pendent party jurisdiction that is more difficult to meet than the *Gibbs* test. But both cases are totally inapposite: both cases involve the doctrine of *ancillary jurisdiction* over separate, later-filed lawsuits that lack an independent basis for subject

matter jurisdiction, and neither case involves jurisdiction over absent class members or 28 U.S.C. § 1367.[2]

In any event, Petitioners then argue that the courts below did "not focus on the facts necessary to support the elements of the federal and state claims," and instead looked only "to the abstract context, including managerial encouragement of fraudulent sales practices, in which the Class Members' claims occurred." Petition at 13. As explained above, this statement is false: both courts below extensively reviewed the facts and allegations involved in the litigation, and concluded that the facts needed to prove both the federal and state law claims were "inextricably intertwined." *See* App. 267-72 (District Court finds that "the state law claims are part of the same case or controversy as the federal claims because the claims are inextricably factually intertwined"); App. 36-43 (Third Circuit finds that plaintiffs alleged a "widespread scheme," that plaintiffs alleged that the scheme constituted common law fraud and violations of §§ 10(b) and 20(a) of the Securities Exchange Act, and that the claims were "inextricably intertwined").

Moreover, although repeating in mantra-like fashion the supposed lack of "factual interdependence" between the federal and state law fraud claims, Petitioners have failed to identify even a single way in which those federal and state law fraud

2. The issue in *Kokkonen* was whether a federal court had jurisdiction to decide a lawsuit for breach of a settlement agreement, when there was no jurisdictional basis for such a lawsuit but there had been jurisdiction over the original, settled lawsuit. Similarly, the issue in *Peacock* was whether a federal court had jurisdiction over a lawsuit seeking to pierce the corporate veil for the purpose of collecting a judgment from a corporation's officer, after the corporation had lost an earlier lawsuit and attempts to collect the judgment from the corporation proved unsuccessful, when there was no jurisdictional basis for the veil-piercing lawsuit but there had been jurisdiction over the earlier lawsuit against the corporation.

claims are different, or why any minor differences, even if they exist, should defeat the finding of jurisdiction by the two courts that have examined the issue.

Finally, it is undisputed that each named plaintiff properly asserted diversity of citizenship jurisdiction — a fact buried in a footnote in the Petition. The District Court concluded that diversity jurisdiction was a valid additional basis for federal subject matter jurisdiction, App. 272-81, and, in her concurring opinion, Judge Roth would have expressly affirmed this conclusion on appeal. App. 158-60. The majority declined to reach this issue, in light of their finding of federal question jurisdiction. App. 43-50.

II.

THE COURTS BELOW PROPERLY MADE FACTUAL FINDINGS THAT THE CLASS REPRESENTATIVES ASSERT THE SAME CLAIMS AS DO THE ABSENT CLASS MEMBERS

The Petition also challenges the Class Representatives' standing to represent some or all absent class members, but once again ignores the factual findings of the courts below. Each class representative was found to have alleged viable claims against Prudential that, at least individually, gave rise to an Article III "case or controversy," thus satisfying the requirement of individual standing. Petitioners argue that plaintiffs lack standing to represent class members with what they call "other claims," because, *they assert*, the Class Representatives do not allege those claims. But as already discussed, the courts below found that the Class Representatives *did* allege so-called "other claims." *See* App. 103-06; 314-15; 194; 422-24; 181-90.

Petitioners also argue that because some class members *purportedly* did not suffer an injury-in-fact, there is no "case or controversy" as to those class members. This argument is similarly factually incorrect. *Id.* Moreover, it is also legally incorrect.

First, the presence of an Article III "case or controversy" is determined vis-a-vis the named parties in a class action. Because the Class Representatives unquestionably had standing to assert the claims they alleged, there is no need to analyze whether each absent class member also has standing. The presence of class representatives with concrete, individual claims fulfills the purpose underlying Article III's "case or controversy" requirement, which is to insure the requisite degree of adversary-ness; any further "standing"-type issues relating to absent class members simply raise questions as to whether the requirements of Rule 23 have been satisfied.[3] *See also infra* at Point III.

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3. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498 (1975) (Article III standing requirement ensures plaintiff has "a personal stake in the outcome of the controversy."); *Allen v. Wright*, 468 U.S. 737, 751 (1984). *See generally* 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 2.05, at 2-29 (3d ed. 1992) ("Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court, and there remains no further separate class standing requirement in the constitutional sense."); *id.* at 2-41 ("Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions."); 7B Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 1785.1 at 141 (2d ed. 1986) ("As long as the representative parties have a direct and substantial interest, they have standing; the question whether they may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation.").

Similarly, Article III does not require proof that each absent class member sustained personalized injuries. Classes often are defined to include all purchasers of a particular product, deferring to a subsequent procedure a determination of whether particular individuals have suffered injury and what those injuries are.[4] App. 281-83. Indeed, plaintiffs are encouraged to define a class in objective terms, without regard to the merits of the claim or the seeking of particular relief.[5]

Lewis v. Casey, 518 U.S. 343, 357 (1996), is not to the contrary. In *Lewis v. Casey*, this Court held that the only injury suffered by the sole remaining class representative was caused by the defendant-prison's failure to provide special services in light of the class representative's illiteracy. Therefore, there was no class representative with standing to raise the *other* prison failings alleged in the Complaint on behalf of absent class members but not the class representative.[6] Contrary to the Petitioners' argument, this Court never rejected the notion that,

> [o]nce threshold individual standing by the class representative is met, a proper party to raise a

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4. *See, e.g., In re School Asbestos Litig.*, 104 F.R.D. 422, 424, 533-34 (E.D. Pa. 1984), *aff'd in pertinent part and vacated in part on other grounds*, 789 F.2d 996 (3d Cir. 1986) (certifying Rule 23(b)(3) opt-out class of "essentially all public school districts and private schools in the nation").

5. *See, e.g.*, 2 H. Newberg & A. Conte, *Newberg on Class Actions* § 6.14 at 661 (3d ed. 1992); *see generally Manual for Complex Litigation, Third* § 30.14 at 217-18 (1995).

6. As discussed above and again *infra* at Point III, the Third Circuit and the District Court both agree that the Class Representatives possessed and alleged the same claims that were alleged on behalf of the Class. App. 103-06; App. 422-24; App. 194; App. 314-15; App. 181-90.

> particular issue [asserted by the class representatives] is before the court, and there remains no further separate class standing requirement in the constitutional sense.

Petition at 10 (quoting App. at 53 and 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 2.05, at 2-29 (3d ed. 1992)).

Second, even if Article III were construed to require that all absent class members have sustained some injury-in-fact, and that this be demonstrated as a prerequisite to class certification, this standard is met. To have standing under Article III, the plaintiff need only allege "distinct and palpable" harm rather than wholly "abstract," "conjectural," or "hypothetical" injury.[7] The injury alleged "need not be large, [as] an identifiable trifle will suffice" to confer standing.[8]

In this case, the courts below found that the nature of Prudential's alleged deceptive practices — which impacted the design and pricing of its insurance products, its dividend determinations, and its investment decisions — were claimed to have injured, and did injure, all policyholders. App. 103-06; App. 422-24; App. 194; App. 314-15; App. 181-90. As found by the District Court and affirmed by the Third Circuit, the complaint alleged that Prudential's misconduct injured all class members, and plaintiffs' discovery substantiated that Prudential's misconduct injured all class members. *Id.* These injuries include economic damages in the form of premium overcharges, lower dividends, lost death benefits, diminished

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7. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

8. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973).

cash values, and excessive policy charges. *Id.* These present injuries, some or all of which, the courts below found, were properly alleged to have been incurred by all class members, *id.*, are more than sufficient to confer Article III standing. *See also* Transcript, April 16, 1996, at 72-73 (Judge Wolin recognizes Complaint as alleging that "Prudential manipulated the surplus so that . . . all 10 million policyholders did not receive a fair distribution of the surplus").

Third, even if standing must be shown with respect to all absent class members and some segment of the class could be characterized as "uninjured" claimants in the sense of not having a measurable economic loss — a conclusion that is wholly at odds with the complaint and the undisputed record — Article III standing nevertheless is satisfied. Present economic damages are not required to state a cognizable claim for contractual and fraud-based claims such as those at issue in this case. Class members still would be eligible for rescission, reformation, or similar equitable remedies.[9] The uniform existence of such comparable common law claims satisfies even the most stringent reading of Article III.[10]

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9. *See, e.g.*, *Hilton Hotels Corp. v. Piper Co.*, 214 N.J. Super. 328, 336, 519 A. 2d 368, 372 (Ch. Div. 1986) (rescission is available for fraud, failure of consideration, or material breach); *Restatement of Contracts (Second)* § 164(1), at 445 (1981) ("If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.").

10. *See, e.g.*, John Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1431 (1995) (under the "more conservative view . . . only claims that have accrued under state law . . . [are] cognizable under Article III").

III.

THE COURTS BELOW PROPERLY MADE FACTUAL FINDINGS THAT THE CLASS REPRESENTATIVES ARE TYPICAL

Reprising the same rejected and incorrect factual premises, Petitioners argue that the Class purportedly comprises myriad "abstract 'other claims,' " and that the Class Representatives therefore are not typical. Petition at 18. But both the District Court and the Third Circuit made factual findings that, contrary to Petitioners' arguments, the Class Representatives *did* possess the so-called "other claims." App. 103-06; App. 422-24; App. 194; App. 181-90. *See also* App. 64-68 (Third Circuit affirmance of District Court's typicality findings); App. 313-15 (District Court's typicality findings).

Thus, for the reasons described above and in the opinions below, Petitioners' underlying factual premises are incorrect: all Class Members' claims arise from the same common course of conduct and their claims are based on the same legal and factual theories. That is all Rule 23(a)(3) requires. *See* 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 3.15 at 168 (3d ed. 1992) ("Factual differences will not render a claim atypical if the claim arises from the same . . . course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory."); *see also* 7A Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 1764 at 243 (2d ed. 1986) ("plaintiff has satisfied Rule 23(a)(3) if the claims or defenses of the representatives and members of the class . . . are based on the same legal or remedial theory").

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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